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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

GEORGE A. McBRIDE,
Assignor to the Western Cartridge Co., a Corporation,
Petitioner,

vs.

OLIVER J. TEEPLE,
Assignor to the E. I. du Pont de Nemours & Company,
Respondent.

No. 1007 76

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Customs and Patent Appeals.

JOHN H. BRUNINGA,
JOHN H. SUTHERLAND,
Counsel for Petitioner.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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No. .....,

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Customs and Patent Appeals.

To the Honorable The Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, George A. McBride, respectfully prays for writ of certiorari to the United States Court of Customs and Patent Appeals to review the judgment of that Court entered February 26, 1940, Petition for Rehearing denied April 5, 1940.

SUMMARY AND SHORT STATEMENT.

Petitioner and Respondent have been involved in an Interference proceeding in the United States Patent Office with respect to conflicting claims to the subject matter of Respondent's Patent No. 1,924,465.

Petitioner filed his application (R. 13) involved in the Interference proceeding on November 5, 1934; but prior thereto, on November 14, 1930, Petitioner had filed a previous application (now Patent No. 1,955,927) (R. 9), which disclosed the subject matter of Count 1 of the Interference. Subsequent to the filing of Petitioner's first application, but prior to the filing of Petitioner's second application, Respondent filed an application (R. 31) and later another, upon which his Patent No. 1,924,465 (R. 27) issued. Count 1 of the Interference is claim 1 of Respondent's patent (R. 53), and this proceeding is restricted to Count 1.

While the interference concerns the manufacture of propellant powders, it is not necessary for the Court to inquire into the facts except to the extent set forth in the paragraph just preceding.

THE DECISION OF THE COURT BELOW.

The Court below has held that Teeple was entitled to a date no earlier than February 4, 1931 (R. 589-90), for the subject matter of Count 1. On that date Teeple filed an application for patent in which said Count 1 was presented as a claim (R. 35), and to that extent disclosed the subject matter here in issue. The Court further held (R. 584) that the McBride application filed November 14, 1930, disclosed the subject matter of said Count 1, but the Court refused to hold that McBride was the prior inventor of the subject matter of said count. Thus, while the Court says

affirmatively that McBride invented the subject matter before Teeple, it refused to make award of priority to McBride. The Court below held that, notwithstanding the fact that said McBride application filed November 14, 1930, was, when filed and while pending in the Patent Office at the time the Teeple patent issued, a constructive reduction to practice of the subject matter of Count 1, the application has lost that characteristic by virtue of having in the meantime become patented.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

Petitioner believes that writ of certiorari should be granted in this case because the United States Court of Customs and Patent Appeals has failed and refused to follow this Court's decision in Alexander Milburn Company v. Davis-Bournonville Company, 270 U. S. 390.

In the Davis-Bournonville case this Court held that the filing of an allowable application for patent is conclusive evidence that the applicant therefor had completed the disclosed invention as of the date of filing the application and that in determining a question of priority of invention the filing of such an application constitutes a reduction to practice of the subject matter disclosed; but the Court of Customs and Patent Appeals has, by its decision in the instant case, in effect held that such is not the law after the application is laid open to the public by being patented.

Shortly after the decision of this Court in Alexander Milburn v. Davis-Bournonville case, supra, the United States Court of Customs and Patent Appeals, in Conover v. Downs, 35 F. (2) 59, refused to apply the doctrine of the Davis-Bournonville case. Subsequently, as illustrated

by Wiley v. Mears, 75 F. (2) 510, the United States Court of Customs and Patent Appeals apparently recanted, and followed the Davis-Bournonville case by according a patented application full effect as a constructive reduction to practice of the subject matter disclosed by it, as of its filing date. Until the Court of Customs and Patent Appeals rendered its decision in the instant case, Wiley v. Mears, supra, stood as the last expression by that Court upon the subject. In its decision in this case, however, the Court of Customs and Patent Appeals has overruled Wiley v. Mears, and reverted back to Conover v. Downs; which, as aforesaid, is in direct conflict with this Court's decision in Alexander Milburn v. Davis-Bournonville.

The decision of the United States Court of Customs and Patent Appeals is in direct conflict upon this important question of patent law with the decisions of other inferior Federal Courts in interference cases: Harper v. Zimmermann, 41 F. (2) 261, D. C. D. Delaware; Cleveland Trust Company v. Thomas, 1 F. Supp. 917; and in direct conflict with a host of decisions by other Federal Courts in cases involving the same question—priority of invention.

PUBLIC INTEREST.

The apparent independence of the Court of Customs and Patent Appeals and its disposition to depart from or disregard the established law is a matter of great public interest and concern.

PRAYER.

Wherefore, your Petitioner respectfully prays that writ of certiorari be issued to the United States Court of Customs and Patent Appeals, to the end that the questions herein presented with respect to Count 1 may be reviewed

and determined by this Court; and that the judgment of the Court of Customs and Patent Appeals be modified so as to award priority to Petitioner with respect to Count 1.

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Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION OF THE COURT BELOW.

The opinion of the United States Court of Customs and Patent Appeals (Judge Lenroot writing) is reported at 109 F. (2d) 789 and appears at pages 575 to 595 of the record. The portion of the opinion addressed to the matter presented by this Petition extends from page 6 (R. 580) to page 14 (R. 585).

JURISDICTION.

Judgment of the Court of Customs and Patent Appeals was entered February 26, 1940.

The jurisdiction of this Court is invoked under Sections 195 and 240-A of the Judicial Code, Title 28, United States Code, Sections 308 and 347 (Rules 42 and 38).

While this Court held in Postum Cereal Company v. California Fig Nut Company, 272 U. S. 693, that it had no jurisdiction to review a trade-mark opposition proceeding upon certiorari, and while it has been ably argued that this Court has no jurisdiction to grant certiorari to review decisions of the Court of Customs and Patent Appeals in *ex parte* appeals from the Patent Office (see Keller v. Coe, No. 789, 1935 Term, Brief in Opposition to Certiorari by the then Solicitor-General, now Mr. Justice Reed), this Court has never held that it had no such jurisdiction in patent interference proceedings, as to which the reasoning of Postum Cereal Company v. California Fig Nut Company does not apply. Such reasons will be presented *in extenso* under "Argument."

STATEMENT OF THE CASE.

The material facts necessary for an understanding of the matter presented in this Petition are:

(a) That Petitioner filed an application for Letters Patent on November 14, 1930, and that the Court of Appeals has held that said application fully disclosed the subject matter involved here. The application of Petitioner immediately involved in this interference was filed November 5, 1934.

(b) That Respondent Teeple filed an application for Letters Patent on February 4, 1931, and the Court of Customs and Patent Appeals has held that date to be the earliest date established by Respondent Teeple.

(c) That despite the earlier filing and full disclosure by Petitioner in his application filed November 14, 1930, the Court of Customs and Patent Appeals has refused to hold that Petitioner ante-dated Respondent Teeple.

SPECIFICATION OF ERRORS.

1. That the United States Court of Customs and Patent Appeals erred in holding that when a patent application conceded to constitute a constructive reduction to practice when filed becomes patented it no longer constitutes a constructive reduction to practice as of the filing date, and in that respect the Court of Customs and Patent Appeals failed and refused to follow the decision of this Court in Alexander Milbourne v. Davis-Bournonville, 270 U. S. 390.

2. That the United States Court of Customs and Patent Appeals erred in failing and refusing to award priority of invention of the subject matter of Count 1 to McBride when the Court did rule that McBride had filed an allowable application disclosing the subject matter prior to any date established by Teeple.

ARGUMENT.

I.

THIS PROCEEDING IS JUDICIAL AND NOT MERELY ADMINISTRATIVE IN NATURE, AND THIS COURT HAS CONSTITUTIONAL POWER TO REVIEW SUCH DECISIONS OF THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS.

The decision of this Court in Postum Cereal Company v. California Fig Nut Co., 272 U. S. 693,[1] is bottomed upon the proposition that the decision of the Court of Appeals for the District of Columbia (which, under the statutes then in force, had jurisdiction of appeals from the Patent Office) was not judicial, but was merely administrative in nature. In trade-mark opposition proceedings, as involved in that case, no **substantive** right of either party was subject to adjudication in any way either by the Court of Appeals or the Patent Office. The case concerned itself solely with an administrative function, namely, the registration of a trade-mark, which in no way affected the substantive rights of anyone.[2]

The situation presented by a patent interference proceeding is definitely distinguishable, however, in that the decision of the United States Court of Customs and Patent

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1 Followed in another trade-mark opposition proceeding, Pacific Northwest Canning Co. v. Skookum Packers' Association, 283 U. S. 858.

2 Section 23 of the Trade-Mark Act of February 20, 1905, provides:
"That nothing in this act shall prevent, lessen, impeach, or avoid any remedy at law or in equity which any party aggrieved by any wrongful use of any trade-mark might have had if the provisions of this act had not been passed,"

and the Courts have accordingly held that:

"No right of property is concluded by registration of a mark, and the parties affected are free to seek such relief as the Courts of law or equity may award." Patton Paint Co. v. Sunset Paint Co., 290 Fed. 326, l. c. 328; William Rogers v. International Silverware Co., 30 App. D. C. 97, 105.

Appeals upon the question of priority of invention is controlling upon the parties to the case: Morgan v. Daniels, 153 U. S. 120, l. c. 125; Radio Corp. v. Radio Laboratories, 293 U. S. 1, l. c. 6. It has been held to amount to *res adjudicata:* Shimadzu et al. v. Electric Storage Battery Co., 17 F. Sup. 42, l. c. 49 (reversed on other grounds, 307 U. S. 5); and the same effect has been intimated in other cases, R. Thomas & Sons Co. v. Electric Porcelain & Mfg. Co., 111 F. Rep. 923, l. c. 929; Westinghouse Electric and Manufacturing Co. v. Wadsworth Electric Manufacturing Co., 51 F. (2) 447, l. c. 448.

In the circumstances of the instant case, the Du Pont Company has received a patent for subject matter which, as decided by the Court of Customs and Patent Appeals, was in fact disclosed in a McBride application filed in the United States Patent Office prior to any date established by the Du Pont Company for Teeple. This is an adversary proceeding, and the only one provided by the judicial machinery in this country whereby McBride can recover from the Du Pont Company the patent protection rightfully belonging to him.

The two basic reasons which support this Court's decision in Postum Cereal Company v. California Fig Nut Company, supra, but do not apply to a patent interference proceeding such as the instant case, are:

1. That the thing contested in a trade-mark opposition proceeding under the Trade-Mark Act of 1905, as was the Postum Cereal case, is a mere right to registration which in no way affects the substantive or property rights of either party to the trade-mark in question.

2. That regardless of the outcome of such a trade-mark opposition proceeding, the proceeding cannot prevent, lessen, impeach, or avoid any remedy at law or in equity; and consequently the findings of the

administrative tribunals are neither conclusive nor controlling upon the parties.

As distinguished from the situation created by the Trade-Mark Act of 1905, the decision of the Court of Customs and Patent Appeals in a patent interference case does in fact prevent, lessen, impeach and avoid remedies at law and in equity; and for all practical purposes binds the parties to the case with respect to the adjudicated question—priority of invention—which does affect a substantive property right.

A patent interference proceeding is therefore a case or controversy within the meaning of the Constitution of the United States, and as defined by this Court in such cases as Muskrat v. U. S., 219 U. S. 346; Cohen v. Virginia, 6 Wheaton 264; Marbury v. Madison, 1 Cranch 137; Chisholm v. Georgia, 2 Dallas 431.

In the Muskrat case, supra, this Court quoted Mr. Justice Field with approval as follows:

> "* * * By cases and controversies are intended the claims of litigants brought before the Courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication."

Clearly, the present case falls within the above definition. It is a controversy involving the claim of the litigants before the Courts for determination by regular proceedings established by law for the redress of a wrong,

to wit, the wrongful issuance of a patent to Teeple for the invention covered by Count 1 of the Interference. The claim is definitely under the Constitution and laws of the United States, and is in such form that the judicial power is capable of acting upon it. The parties are decidedly adverse, and their contentions were submitted to the Court below for adjudication.

Furthermore, at the time this Court decided in Postum Cereal Company v. California Fig Nut Company that it had no jurisdiction to review the matter upon certiorari, there was still open to the parties in that case a **judicial** proceeding (under R. S. 4915) whereby the controversy might be litigated, so that in point of fact at that time (but not now)[1] the decision of the United States Court of Customs and Patent Appeals did not constitute a binding judgment upon the parties.

It is therefore believed evident that the *ratio decidiendi* of Postum Cereal Company v. California Fig Nut Company, supra, is not apposite in the case of a patent interference, which is, in reality, a judicial proceeding, and accordingly the Postum case does not establish lack of jurisdiction in the instant case.

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1 At the time of this Court's decision in Postum Cereal Company v. California Fig Nut Company, R. S. 4915 permitted the institution of proceedings in equity subsequent to the decision of a Patent Office Appellate Tribunal (then the Court of Appeals for the District of Columbia), whereas at the present time, by virtue of amendments made to R. S. 4915, March 2, 1927, and March 2, 1929, such proceeding in equity is not available after a decision by the United States Court of Customs and Patent Appeals.

II.

THE DECISION OF THE COURT OF CUSTOMS AND PATENT APPEALS, HOLDING THAT McBRIDE'S APPLICATION FILED NOVEMBER 14, 1930, DISCLOSED THE SUBJECT MATTER AND THAT TEEPLE HAD ESTABLISHED NO DATE PRIOR TO FEBRUARY 4, 1931, ESTABLISHES A SITUATION IN WHICH, AS BETWEEN McBRIDE AND TEEPLE, McBRIDE WAS THE FIRST INVENTOR ACCORDING TO THE DOCTRINE OF ALEXANDER MILBOURNE V. DAVIS-BOURNONVILLE, 270 U. S. 390.

After fully discussing the disclosure of McBride's application filed November 14, 1930, the Court of Customs and Patent Appeals stated (R. 584):

> "It follows from the foregoing that we are in agreement with the Board of Appeals that appellant is entitled to the date of his application (November 14, 1930) upon which his said patent was issued for conception of the invention embraced in count 1.
>
> "Appellant, however, contends that he is also entitled to the date of said application for constructive reduction to practice of the invention. The board held against appellant upon this point upon the ground that there was a hiatus between the time of issue of appellant's patent upon his early application and upon the time of filing of appellant's application here involved, and that he was not entitled to the date of said early application for constructive reduction to practice of the invention.
>
> "In support of his contention appellant relies largely upon our decision in the case of **Wiley v. Mears et al.**, 22 C. C. P. A. (Patents) 986, 75 F. (2d) 510, while appellee relies upon our decision in the case of **Conover v. Downs**, 17 C. C. P. A. (Patents) 587, 35 F. (2d) 59,

in support of the contrary conclusion reached by the board.

"An examination of **these two cases**[1] discloses that they appear to be **in conflict** in that in the **Wiley v. Mears et al.** case, supra, an earlier application was held to constitute a constructive reduction to practice with respect to certain counts although there was lack of continuity in the applications, while in **Conover v. Downs**, supra, a contrary view was expressed."

(l. c. 14) R. 585:

"In any event, as hereinbefore stated, we adhere to the views expressed in **Conover v. Downs**, supra, and hold that while appellant is entitled to the date of his early application, November 14, 1930, for conception of the invention embraced in count 1, that application did not constitute a constructive reduction to practice of the same."

It is thus recognized by the Court of Appeals that **its decisions**, upon the question here presented, **are in conflict with each other**; and while its more recent decision, Wiley v. Mears, supports[1] the contention of Petitioner here, its earlier decision, Conover v. Downs, was contrary thereto. In its decision in the instant case the Court below readopted the views expressed in Conover v. Downs, although it was urged (Petition for Rehearing, pp. 5-11, R. ...) that the decision was in direct conflict with the holding of this Court with respect to reduction to practice in Milburn v. Davis-Bournonville.

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1 Emphasis in quotations supplied throughout unless otherwise indicated.

1 **"As a matter of law, if the disclosures of the Wiley application of May 10, 1928, which ripened into his patent of November 11, 1930, support the counts, Wiley is entitled to the award of priority in view of the evidence in the case."** 75 F. (2), l. c. 513.

The date of reduction to practice of an invention is the date upon which the invention is completed, and generally[2] the date determinative between several inventors as to which was the first to invent the subject matter. Reduction to practice may be established in two ways:

1. Actually (not involved here) by practical, successful test of the thing sought to be patented;

2. Constructively (the situation of both parties here) by the filing of allowable application for patent, disclosing the subject matter sought to be patented.

Whether the reduction to practice be actual or constructive, it must be established in an interference proceeding by **evidence**; but with a constructive reduction to practice, that evidence is already of record in the Patent Office in the form of an application for patent. Succinctly, the question presented here is whether such a piece of evidence which, while an application in the secret archives of the Patent Office, constituted conclusive evidence of such reduction to practice, loses that characteristic when it becomes patented and open to the public.

The case of Alexander Milbourne v. Davis-Bournonville, supra, involved a situation where the plaintiff's patent (Whitford) application was filed in the Patent Office on March 4, 1911, and the patent issued June 4, 1912. Prior to the filing of Whitford's application, one Clifford had filed an application on January 31, 1911, so that both Whitford's and Clifford's applications were co-pending in the Patent Office. The Clifford application disclosed the subject matter patented to Whitford and hence constituted a constructive reduction to practice thereof.

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2 The date of conception, when coupled with reduction to practice by reasonable diligence, is regarded as the legally effective date; but no such situation is involved here.

The factual situation in the instant case is precisely parallel to the factual situation in Milbourne v. Davis-Bournonville. In the instant case Respondent's patent (Teeple) application was filed in the Patent Office February 4, 1931, and the patent issued August 29, 1933. Prior to the filing of Teeple's application McBride had filed an application on November 14, 1930, so that both Teeple's and McBride's applications were co-pending in the Patent Office. That McBride's application disclosed the subject matter patented to Teeple has been held by the tribunals below.

Since, in the Milbourne case, this Court held that the applications of the patentees showed that Clifford had invented the subject matter prior to Whitford:

> "The description (of Clifford) shows that Whitford was not the first inventor. Clifford had done all that he could do to make his description public," (l. c. 401)

so we contend that the applications themselves in this proceeding show that Teeple was not the first inventor; and, as between Teeple and McBride, the applications show that McBride was the prior inventor. In failing so to hold that McBride was the prior inventor to Teeple, the Court of Customs and Patent Appeals has failed to give effect to this Court's decision in Milbourne v. Davis-Bournonville by failing to accord McBride the benefits of his application filed November 14, 1930, as a constructive reduction to practice, although conceding that this application disclosed the subject matter.

McBride's application filed November 14, 1930, did not mature into a patent until April 24, 1934, eight months after the issuance of the patent to Teeple. McBride's application involved in this Interference was filed November 5, 1934, so that neither the Teeple patent nor McBride's

Patent No. 1,955,927 constituted a statutory bar against it. This precise point was covered by this Court's decision in Alexander Milbourne v. Davis-Bournonville, where this Court said (l. c. 401-2):

> "It is said that without a claim the thing described is not reduced to practice. But this seems to us to rest on a false theory helped out by the fiction that by a claim it is reduced to practice. **A new application** and a claim **may be based on the original description within two years,** and the original priority established notwithstanding intervening claims. Chapman v. Wintroath, 252 U. S. 126, 137. **A description that would bar a patent if printed in a periodical or in an issued patent is equally effective in an application so far as reduction to practice goes.**"

Clearly, McBride's application involved in this Interference was such a "new application," and Count 1 of the Interference (the only count involved here) was a claim based on the original description "within two years."

In Conover v. Downs, 35 F. (2) 59, the doctrine of which was readopted by the Court of Customs and Patent Appeals in its decision in the instant case, that Court did discuss this Court's decision in Alexander Milbourne v. Davis-Bournonville, but held that the doctrine of that case was not applicable to an interference proceeding, and made other distinctions not applicable to the instant case.

The only difference between an interference proceeding, such as this case, and a proceeding such as Alexander Milbourne v. Davis-Bournonville (270 U. S. 390, where the defendant attacked the validity of the plaintiff's patent) is that in an interference proceeding one party says to the other that the thing you have patented was first invented by me, rather than saying that the thing you have invented was first invented by a third party. Plainly the **same question of priority of invention** is involved in both pro-

ceedings. The proof necessary to establish prior invention is no different in character in one type of case than in another. The object of the litigation cannot affect the character of proof necessary to establish **priority of invention.**

It would seem plain that if the filing of an allowable application for patent establishes a reduction to practice and thus determines **priority of invention** in one kind of case, as this Court has held in Alexander Milbourne v. Davis-Bournonville, the filing of such an allowable application for patent must constitute proof of the same thing in any other kind of case. The filing of an allowable application is record evidence conclusively establishing a date, and as a piece of evidence such a filed application must speak the same in all proceedings.

Following the theory of Conover v. Downs, such question of priority is determined by one kind of law in an infringement suit, and by a different kind of law in an interference case; but such has not been the practice of the Courts. When this Court was considering an interference case, to wit, Chapman v. Winthroath, 252 U. S. 126, it made the following statement (l. c. 137):

> "To this we must add that not only have later or divisional applications not been dealt with in a hostile spirit by the courts, but, on the contrary, designed as they are to secure the patent to the first discoverer, they have been favored to the extent that where an invention clearly disclosed in an application, as in this case, is not claimed therein but is subsequently claimed in another application, the original will be deemed a constructive reduction of the invention to practice and the later one will be given the filing date **of the earlier, with all of its priority of right,"**

it cited in support thereof the infringement case of Smith & Griggs Manufacturing Co. v. Sprague, 123 U. S. 249, 250.

The effect of Conover v. Downs, 35 F. (2), and the Court of Customs and Patent Appeals' decision in this case is to say that, while an application is pending in the Patent Office, while it reposes in the secret archives of the Patent Office, it does constitute a constructive reduction to practice; yet when it is laid open to the public, so that the public may know about the disclosure, it no longer constitutes a constructive reduction to practice as of its filing date. In this respect the decision of the Court below is directly contrary to the decision of this Court in Alexander Milbourne v. Davis-Bournonville. Even in that case the application which this Court held to be a constructive reduction to practice as of its filing date had become patented, and despite the fact that it was thus laid open to the public, this Court held that it constituted a reduction to practice, and established that the patentee thereof (Clifford) had invented the subject matter prior to the other contestant, Whitford.

What the Court of Customs and Patent Appeals has done is to say to McBride that, while the record shows that you invented the subject matter first, we will not award priority to you because you have permitted your early application to become patented. What the Court below held in Conover v. Downs, supra, and reaffirmed in this case, is that Supreme Court law may apply in determining the question of **priority of invention** in the other courts, but it does not apply to determinations of that same question—priority of invention—in the Court of Customs and Patent Appeals.

CONCLUSION.

From the foregoing, we submit, that the Court of Customs and Patent Appeals has failed to apply the established law in this case; that priority of invention is a question determined no differently in one kind of case than in

another, and that it is important not only to Petitioner, but to the public, inventors and industry at large that the Court of Customs and Patent Appeals be required to follow the law as established by decisions of this Court.

Wherefore your Petitioner prays that the petition be granted, that writ of certiorari be issued, the cause reviewed to the extent requested, and the judgment of the Court below be modified to award priority of invention as to Count 1 to Petitioner.

Respectfully submitted,

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 76

GEORGE A. McBRIDE,
Assignor to the Western Cartridge Company, a Corporation,

Petitioner,

vs.

OLIVER J. TEEPLE,
Assignor to the E. I. du Pont de Nemours & Company,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Customs and Patent Appeals in a Patent Interference Proceeding.

BRIEF FOR RESPONDENT IN OPPOSITION

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June 11, 1940.

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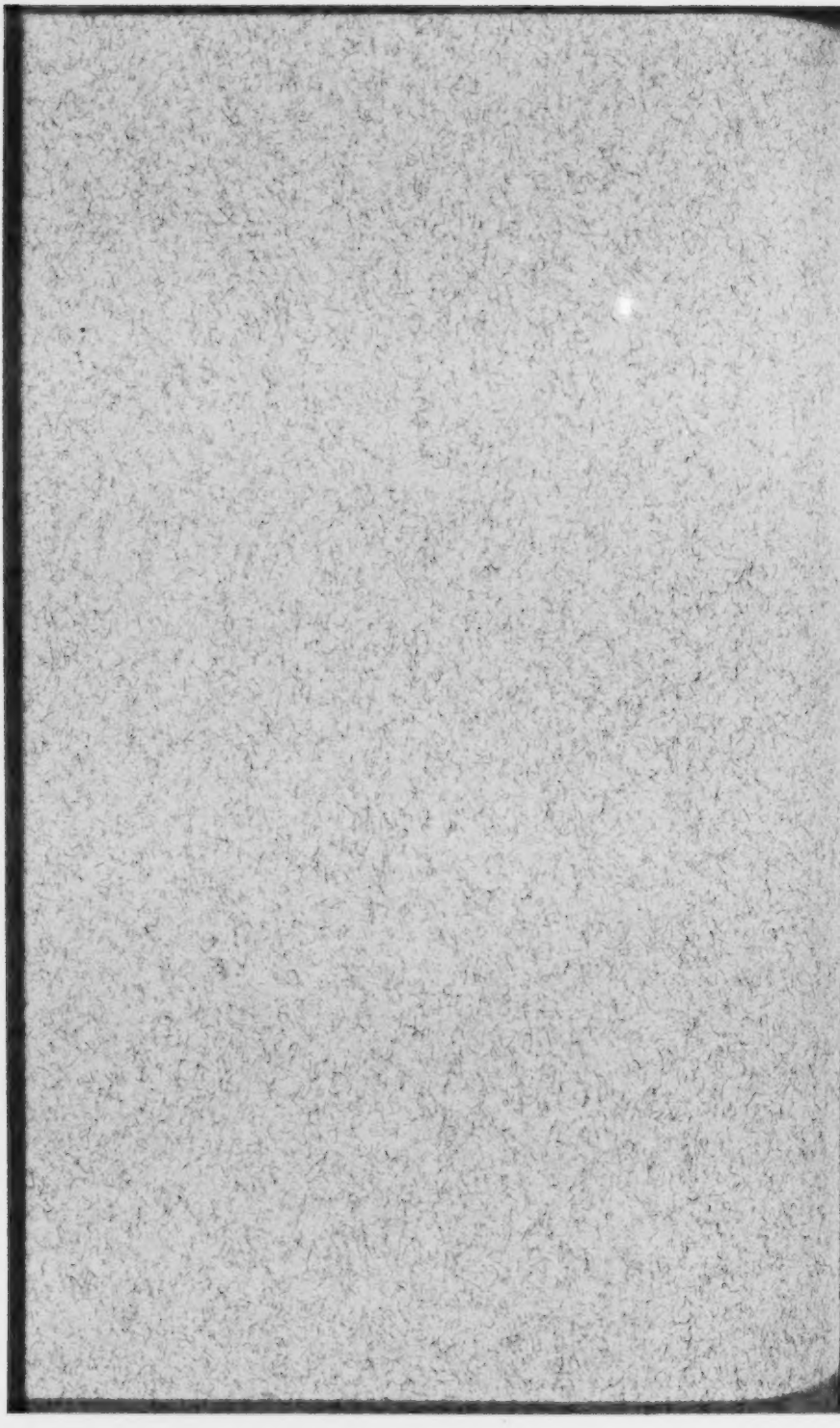

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 76

GEORGE A. McBRIDE,
Assignor to the Western Cartridge Company, a Corporation,
Petitioner,

vs.

OLIVER J. TEEPLE,
Assignor to the E. I. du Pont de Nemours & Company,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Customs and Patent Appeals in a Patent Interference Proceeding.

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE.

The petition of George A. McBride prays that a writ of certiorari issue to review a decision of the United States Court of Customs and Patent Appeals (109 F. (2d) 789) rendered on February 26, 1940 in a Patent Interference proceeding under Section 4914 R. S. (35 U. S. C. A. § 62) on appeal from the United States Patent Office (R. 575-

595). Petitioner's statement of the case is such that it needs amplification and correction.

The decision of the United States Court of Customs and Patent Appeals which the petitioner seeks to have reviewed reversed the decision of the Board of Appeals of the United States Patent Office awarding priority to respondent with respect to count 1 of the Interference proceeding and remanded the cause to the United States Patent Office in order that a finding might be made as to that count on the question of petitioner's diligence (R. 592). As to all other counts of this Interference, the Court of Customs and Patent Appeals affirmed the concurring decisions of the Patent Office tribunals awarding priority to respondent (R. 595). The petition for writ of certiorari relates solely to count 1 (Petition, p. 2, line 15) on which this Interference has been remanded by the Court of Customs and Patent Appeals to the Patent Office for a finding of fact as to petitioner's diligence.

Respondent is involved in this Interference proceeding on Patent No. 1,924,465, issued August 29, 1933 (R. 27), which was filed during the pendency of and is a continuation in part of his copending application filed February 4, 1931 (R. 31). The Court of Customs and Patent Appeals affirmed the concurring findings of the Patent Office tribunals holding that respondent is entitled to February 4, 1931, the date of his earlier filed copending application as his record date not only for conception but also for constructive reduction to practice of the invention embraced in count 1 (R. 588).

Petitioner is involved in this Interference proceeding on an application filed November 5, 1934 (R. 13), more than a year after the issuance of respondent's patent. More than six months prior to the date of filing petitioner's application involved in this Interference, there was issued to peti-

tioner on April 24, 1934, Patent No. 1,955,927, the application for which was filed November 14, 1930 (R. 9). None of the claims of petitioner's patent embrace the invention here involved (R. 577-578). This patent of petitioner's is not directly involved in this Interference but is relied upon by petitioner as evidence to establish his claim to an award of priority as to count 1 (R. 595).

The Examiner of Interferences held that petitioner's patent did not disclose the issue and made no express finding with respect to petitioner's diligence (R. 480). The Board of Appeals decided that petitioner's patent was a sufficient disclosure with respect only to count 1 of the Interference, but made no finding with respect to petitioner's diligence, holding that petitioner had not raised the question of diligence before the Examiner of Interferences (R. 490). The Board of Appeals further agreed with the Examiner of Interferences that inasmuch as there was a hiatus between the time the earlier application of petitioner eventuated into a patent on April 24, 1934, and the filing on November 5, 1934 of petitioner's application involved in this Interference, petitioner was only entitled to conception as to any counts which would read upon this earlier application (R. 490).

The Court of Customs and Patent Appeals agreed with the Board of Appeals of the Patent Office that petitioner was entitled to the date of his early application November 14, 1930, upon which his patent was issued, for conception of the invention embraced in count 1 (R. 584). The Court further agreed with the Board of Appeals that petitioner was not entitled to the date of this early application for constructive reduction to practice of the invention as to count 1 because there was a hiatus between the date of issue of petitioner's patent upon this application and the time of filing of petitioner's application involved in this Interference (R. 584). Contrary to petitioner's assertion

at the top of page 3 of his petition, the Court of Customs and Patent Appeals did not hold that petitioner's early application constituted a constructive reduction to practice at any time.

The Court stated that they had held in *Conover* v. *Downs*, 35 F. (2d) 59 (1929), that where an application involved in an interference was not filed until after the grant of a patent disclosing but not claiming the invention, the filing of the application which matured into a patent was not a constructive reduction to practice of the invention in issue and that the situation in the present case was exactly that which existed in the *Conover* case (R. 584). The Court adhered to the views expressed in *Conover* v. *Downs, supra,* and held that while petitioner was entitled to the date of his early application November 14, 1930 for conception of the invention embraced in count 1, that application did not constitute a constructive reduction to practice of the same (R. 585).

The Court further held that while petitioner was the first to conceive the invention embraced in count 1, he was the last to reduce it to practice and that, under these circumstances, the question of diligence by petitioner from immediately prior to respondent's entry into the field on February 4, 1931 should be determined before there could properly be an award of priority (R. 590). The Court stated:

> ". . . it is our opinion that in the interest of justice, before making an award of priority, the question of appellant's diligence should be determined, and it is our conclusion that, as to said count 1, the decision of the board should be reversed in order that such finding may be made by the proper Patent Office tribunals." (R. 592)

Thereafter, on March 18, 1940, petitioner filed in the Court of Customs and Patent Appeals a petition for rehearing requesting that Court to reconsider and reverse

the long existing rule of the Patent Office with respect to lack of continuity in applications which prevents a prior patent from being considered as a constructive reduction to practice as stated in *Conover* v. *Downs, supra,* and expressly affirmed in many other cases. The Court of Customs and Patent Appeals denied this petition for rehearing on April 5, 1940 (R. 597). This Interference is now pending before the United States Patent Office for a determination on the issue of petitioner's diligence under the mandate of the Court of Customs and Patent Appeals issued to the Commissioner of Patents on April 15, 1940 (R. 597).

SUMMARY OF ARGUMENT.

In support of respondent's contention that the petition for writ of certiorari should be denied, respondent's arguments are directed to establishing the following propositions:

1. There is neither statutory authority nor constitutional power for jurisdiction to review on certiorari a decision of the United States Court of Customs and Patent Appeals in a patent interference proceeding on appeal from the United States Patent Office. The decision of the Court of Customs and Patent Appeals in a patent interference proceeding is merely an administrative decision and not a judicial judgment.

2. The petition should be denied as premature. There is no final judgment in this Interference as the United States Court of Customs and Patent Appeals has made no award of priority as to count 1, but has remanded the Interference to the Patent Office for further proceedings. Should it be ultimately determined in the further proceedings in this Interference that petitioner was diligent, then the question which petitioner now seeks to raise on certiorari will have become moot.

3. There is no real conflict between the decision of the United States Court of Customs and Patent Appeals in this Interference proceeding and the decision of this Court in *Alexander Milburn Co.* v. *Davis-Bournonville Co.*, 270 U. S. 390, 70 L. Ed. 651 (1926). The *Milburn* v. *Davis* case was an infringement suit in which the issue for determination was the validity of the patent there in suit. No issue was involved in that case as to any right of the patentee of the earlier filed application to subsequently claim the invention in an application filed after the issue of his patent.

In an interference proceeding there is no issue of validity, but only that of priority of invention for purposes of making an award of priority of the subject matter in issue. Petitioner is here claiming the invention in an application filed subsequently to the issue of his earlier patent disclosing but not claiming said invention and seeks to have an award of priority in this Interference based solely upon the filing date of his earlier patent without showing that he was diligent. The issue in this Interference is priority of invention for the purpose of establishing petitioner's right to claim the invention, not the validity of respondent's patent.

The historic policy of the Patent Office, as stated by the Court of Customs and Patent Appeals in *Conover* v. *Downs*, 35 F. (2d) 59 (1929), is to permit an application involved in interference to take the filing date of an earlier filed application of the same party only where the applications were copending and not to give a **continuing** date of application where a hiatus exists. Where the applications are not copending diligence must be shown between the date of the earlier filed application and the date of filing of a subsequent application claiming the invention. Even though a party files his application and discloses the subject matter of invention without claiming same, there is a presumption of abandonment and dedication to the public upon issue

of the patent in the absence of a copending application. Where there is abandonment of the invention by the original application having matured into a patent prior to the filing of a subsequent application claiming the invention, the latter can not be a continuance of the first.

ARGUMENT.

I.

LACK OF JURISDICTION.

A. There Is No Statutory Authority for this Court to Review Decisions of the Court of Customs and Patent Appeals in Patent Cases.

Petitioner invokes the jurisdiction of this Court under Sections 195 and 240-A of the Judicial Code, Title 28, United States Code, Sections 308 and 347 (Rules 42 and 38). (Petitioner's Br. p. 6) Neither Section 240 nor any other section of the Judicial Code makes any provision for certiorari in patent cases to the United States Court of Customs and Patent Appeals. Rule 38 of this Court makes no provision therefor.

The only statutory provision authorizing review by certiorari of decisions of the United States Court of Customs and Patent Appeals is Section 195 of the Judicial Code, as amended (28 U. S. C. A. § 308). However, Section 195 of the Judicial Code relates only to customs cases. It does not refer to either patent or trade-mark cases. Section 195 of the Judicial Code, as amended (28 U. S. C. A. § 308), upon which petitioner relies, provides as follows:

> "The Court of Customs and Patent Appeals shall exercise exclusive appellate jurisdiction to review by appeal, as herein provided, final decisions by the United States Customs Court in all cases as to . . . and the judgments and decrees of said Court of Customs

> and Patent Appeals shall be final in all such cases: *Provided, however,* That in any case in which the judgment or decree of the Court of Customs and Patent Appeals is made final by the provisions of this title, it shall be competent for the Supreme Court, upon the application of either party, duly made as required by section 350 of this title, to require, by certiorari or otherwise, such case to be certified to the Supreme Court for its review and determination, . . . "

Rule 42 of this Court contains the statement "(See sec. 195 Judicial Code, as amended or sec. 7 of the Act of February 13, 1925.)". This plainly indicates that Rule 42, so far as it concerns review of judgments of the Court of Customs and Patent Appeals, relates solely to Section 195 of the Judicial Code. It is very clear that Section 195 of the Judicial Code provides only for customs cases and is not applicable to either patent or trade-mark cases.

The Act of March 2, 1929, Chapter 488 (45 Stat. 1475, 1476; 28 U. S. C. A. § 309a), which transferred jurisdiction of appeals from the Patent Office in patent and trade-mark cases from the Court of Appeals of the District of Columbia to the United States Court of Customs and Patent Appeals, contains no provision purporting to authorize the Supreme Court to review the decisions of the Court of Customs and Patent Appeals in such cases. Subsequent to this Act of March 2, 1929, transferring jurisdiction to the Court of Customs and Patent Appeals, Section 195 of the Judicial Code was amended by Congress on June 17, 1930, but this amendment related only to customs cases and did not confer jurisdiction upon this Court in patent and trade-mark cases.

Under the Act of March 2, 1927, Chapter 273 (44 Stat. 1336; 35 U. S. C. A. §§ 59a, 63), which amended R. S. 4911 and 4915, an applicant for a patent which has been refused in an interference proceeding in the Patent Office

must elect either to appeal to the Court of Customs and Patent Appeals or bring a bill in equity in the Federal courts. Where he elects to bring a bill in equity he may pursue his remedy in the proper United States Circuit Court of Appeals from which an application to this Court may be made under Section 240(a) of the Judicial Code as amended for review on certiorari. Petitioner elected not to bring a bill in equity but to appeal to the United States Court of Customs and Patent Appeals (R. 1) and by such election he has waived his right to proceed in the Federal courts, together with such remedies as apply solely to proceedings in such Federal courts.

Section 240 of the Judicial Code contains no provision for certiorari to the Court of Customs and Patent Appeals. Section 240(a) of the Judicial Code, as amended (28 U. S. C. A. § 347-a), upon which petitioner relies, is as follows:

> "(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

This Section provides only for certiorari to Circuit Courts of Appeals and the Court of Appeals of the District of Columbia.

In *Pacific Northwest Canning Co.* v. *Skookum Packers' Association*, 283 U. S. 858, 75 L. Ed. 1464 (1931), this Court denied for want of jurisdiction, a petition for certiorari to the Court of Customs and Patent Appeals in a trade-mark opposition proceeding, stating:

> "Petition for writs of certiorari to the Court of Customs and Patent Appeals denied for want of jurisdic-

tion. Sec. 240, Judicial Code; Sec. 347, U. S. Code; Title 28; *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693."

It is apparent that the statutes relied upon by petitioner do not support the jurisdiction of this Court on certiorari to the Court of Customs and Patent Appeals in patent cases and that there is no statutory authority warranting review of this Patent Interference proceeding.

B. The Decision of the Court of Customs and Patent Appeals in Patent Cases is An Administrative Decision Which this Court May Not Constitutionally Be Called Upon to Review.

Petitioner, on page 11 of his brief, attempts to distinguish the holding of this Court in *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693, 71 L. Ed. 478 (1927), on the ground that this case was decided prior to the Act of March 2, 1927, at which time there was still open to the parties the opportunity to pursue the concurrent remedy in equity. The fact that when the *Postum Cereal* case was decided an applicant might bring a bill in equity even after pursuing his appellate remedy, whereas since the Act of March 2, 1927 the remedies by appeal and by bill in equity are mutually exclusive, certainly cannot change the administrative decision into a judicial judgment.

Contrary to petitioner's assertion on pages 8 and 9 of his brief, the decision of the United States Court of Customs and Patent Appeals under R. S. 4914 is not res adjudicata. *Morgan* v. *Daniels*, 153 U. S. 120, 38 L. Ed. 657 (1894), relied upon by petitioner, holds that where the question decided in the Patent Office is one between contesting parties as to priority of invention, the decision there made must be accepted as controlling upon that question of fact in any subsequent suit between the same parties unless the contrary is established by testimony which in character and amount carries thorough conviction. The de-

cision of the Court of Customs and Patent Appeals in this Interference does not preclude petitioner from contesting the validity of respondent's patent in any court where it may be called in question. R. S. 4914 (35 U. S. C. A. § 62) expressly provides as follows:

> ". . . But no opinion or decision of the court in any such case shall preclude any person interested from the right to contest the validity of such patent in any court wherein the same may be called in question."

The following statement of this Court in the *Postum Cereal* case, *supra*, is applicable to the present case:

> ". . . It is a mere administrative decision. It is merely an instruction to the Commissioner of Patents by a court which is made part of the machinery of the Patent Office for administrative purposes. In the exercise of such function it does not enter a judgment binding parties in a case as the term 'case' is used in the third article of the Constitution. Section 9 of the Trade-Mark Act of 1905, applies to the appeal taken under it the same rules which under § 4914, Rev. Stat. Comp. Stat. § 9459, 7 Fed. Stat. Anno. 2d ed. p. 202, apply to an appeal taken from the decision of the Commissioner of Patents in patent proceedings. (*citation of authorities.*) Neither the opinion nor decision of the court of appeals under § 4914, Rev. Stat. or § 9 of the Act of 1920, precludes any person interested from having the right to contest the validity of such patent or trade-mark in any court where it may be called in question. This result prevents an appeal to this court, which can only review judicial judgments. . . ." (Pp. 698-699)

In *Frasch* v. *Moore*, 211 U. S. 1, 53 L. Ed. 65 (1908), which is cited in the *Postum Cereal* case, *supra*, this Court denied certiorari to the Court of Appeals of the District of Columbia in a patent appeal, stating:

> ". . . in interference cases and in all others going up from the Commissioner to the Court of Appeals there is no final judgment in the cause, but one interlocutory in its nature, and binding only upon the Com-

> missioner, 'to govern the further proceedings in the case.' The opinion or decision of the court, reviewing the Commissioner's decision, is not final, because it does not preclude any person interested from contesting the validity of the patent in court; . . ." (P. 9)

It is clear that the decision of the Court of Customs and Patent Appeals in this case is not a final judgment. However, even though the decision of the Court of Customs and Patent Appeals in this Interference were a final judgment, the character of the decision would not be changed from an administrative one into a judicial judgment. This Court's decision in the *Postum Cereal* case is apposite in this connection, as follows:

> "It was said in these cases that the appeal was denied because the action of the court of appeals was not a final judgment. This reason was a true one, but it should not be understood to imply that in such a proceeding, circumstances might give it a form that would make it a final judgment subject to review by this court. That is the error that the appellant here has made in pressing its appeal. . . . Whatever the form of the action taken in respect of such an appeal, it is not cognizable in this court upon review, because the proceeding is a mere administrative one." (Pp. 699-700)

This Court made it clear that the decision in the *Postum Cereal* case was based not upon lack of finality of the decision of the appellate court, but upon the administrative nature of the proceedings. This is confirmed by the fact that subsequent to the Act of March 2, 1927, requiring election of remedies, this Court in *Pacific Northwest Canning Co.* v. *Skookum Packers' Association*, 283 U. S. 858, 75 L. Ed. 1464 (1931) *supra*, denied for want of jurisdiction the petition for certiorari to the Court of Customs and Patent Appeals in a trade-mark opposition proceeding and cited as authority therefor the *Postum Cereal* case.

Petition for writ of certiorari to the United States Court of Customs and Patent Appeals has been denied in the fol-

lowing patent interference proceedings: *Fessenden* v. *Wilson*, 284 U. S. 640, 76 L. Ed. 544 (1931); *Chase* v. *Avery*, 307 U. S. 638, 83 L. Ed. 1519 (1939). The writ was also denied in the following ex parte patent appeal cases: *Laughlin* v. *Robertson*, 284 U. S. 652, 76 L. Ed. 553 (1931); *Keller, Heumann & Thompson Co.* v. *Coe*, 298 U. S. 656, 80 L. Ed. 1382 (1936). No petition for writ of certiorari to the United States Court of Customs and Patent Appeals in patent cases has ever been granted.

It is plain that not only statutory authority but constitutional power for jurisdiction is lacking in the present Patent Interference proceeding.

II.

THE PETITION SHOULD BE DENIED AS PREMATURE.

No final judgment of priority as to count 1 has been rendered by the Court of Customs and Patent Appeals in this Interference proceeding. The decision of the Court merely remands this Interference to the Patent Office for further proceedings. Should it be ultimately determined in the further proceedings in this Interference that petitioner was diligent, then the question which petitioner now seeks to raise on certiorari will have become moot.

Since the Court made no award of priority as to count 1, but remanded the Interference to the Patent Office for further proceedings, there is no final judgment in this Interference and this fact alone furnishes sufficient ground for the denial of the writ. *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U. S. 251, 60 L. Ed. 629 (1916).

III.

THE DECISION OF THE COURT OF CUSTOMS AND PATENT APPEALS IN THIS INTERFERENCE IS NOT IN CONFLICT WITH THE DECISION OF THIS COURT IN MILBURN CO. v. DAVIS-BOURNONVILLE CO.

Petitioner alleges a conflict between the decision of the Court of Customs and Patent Appeals in this Interference holding that petitioner's patent filed November 14, 1930 constituted nothing more than evidence of conception, and this Court's decision in *Alexander Milburn Co.* v. *Davis-Bournonville Co.*, 270 U. S. 390, 70 L. Ed. 651 (1926). The Court's decision in this Interference was based fundamentally upon the fact that petitioner's patent, the application for which was filed November 14, 1930, had issued on April 24, 1934, and that **thereafter** on November 5, 1934, petitioner filed his interfering application, thus creating a gap or hiatus between the issuance of his patent and the filing of his application involved in this Interference.

The *Milburn* v. *Davis* case, *supra,* was an infringement suit in which the issue for determination was the validity of the patent there in suit. No issue was involved in that case as to any right of the patentee of the earlier filed application to subsequently claim the invention in an application filed after the issue of his patent.

In an interference proceeding in the Patent Office and on appeal to the Court of Customs and Patent Appeals no issue of validity is involved. An interference proceeding deals only with the question of priority of invention in order to make an award of priority of the subject matter in issue. In this Interference proceeding claim 1 of respondent's patent is involved as count 1, but there is no issue of validity. Neither the Patent Office nor the Court of Customs and Patent Appeals has any jurisdiction to declare a patent

once granted invalid. Petitioner is here claiming the invention in an application filed subsequently to the issue of his earlier patent disclosing but not claiming said invention and seeks to have an award of priority in this Interference based solely upon the filing date of his earlier patent without showing that he was diligent. The issue in this Interference is priority of invention for the purpose of establishing petitioner's right to claim the invention, not the validity of respondent's patent.

The decision of the Court of Customs and Patent Appeals in this Interference proceeding is in accordance with its decision in *Conover* v. *Downs,* 35 F. (2d) 59 (1929), which states the historic policy and practice of the Patent Office. The long existing practice of the Patent Office, as stated in *Conover* v. *Downs, supra,* is to permit an application involved in interference to take the filing date of an earlier filed application of the same party only where the applications were copending and not to give a **continuing** date of application where a hiatus exists. Where the applications are not copending, diligence must be shown between the date of the earlier filed application and the date of filing of a subsequent application claiming the invention. Otherwise, a party could file an application disclosing but not claiming an invention and would be perfectly safe in waiting for any period short of two years after the issue of his patent to file an application claiming the invention so disclosed. This would be a means of continuing the period of the patent monopoly to the detriment of the public.

The decision of the Court of Customs and Patent Appeals in this Interference is in conformity with the decisions of the Federal courts in infringement cases which hold that where a party obtains a patent disclosing subject matter not claimed by the patentee, there is a presumption that such subject matter is dedicated to the public. This is true

under the decisions even though the later application is filed within two years of the issue date of the prior patent.

The now accepted doctrine is that where a patent discloses subject matter not claimed, it is dedicated to the public where there is no copending application. *Sontag Chain Stores Co.* v. *National Nut Co. of California,* No. 671, Oct. Term 1939, U. S. Supreme Court, decided May 20, 1940; *Ball & Roller Bearing Co.* v. *F. C. Sanford Mfg. Co.,* 297 F. 163 (C. C. A. 2, 1924); *O. H. Jewell Filter Co* v. *Jackson,* 140 F. 340 (C. C. A. 8, 1905); *Directoplate Corp.* v. *Donaldson Lithographing Co.,* 51 F. (2d) 199 (C. C. A. 6, 1931); *Elevator Supplies Co., Inc.* v. *Graham & Norton Co.,* 44 F. (2d) 358 (C. C. A. 3, 1930); *Gladding-McBean Corp.* v. *N. Clark & Sons,* 16 F. (2d) 50 (C. C. A. 9, 1926).

In these cases the Federal courts base their decisions on the legal theory that there has been a dedication to the public of the subject matter disclosed but not claimed, and the Patent Office and the Court of Customs and Patent Appeals have arrived at the same result by the hiatus doctrine, as stated in *Conover* v. *Downs, supra.* The Patent Office and the Court of Customs and Patent Appeals do not differ with the rule stated in the *Milburn* v. *Davis* case that a party is entitled to a constructive reduction to practice as of his filing date, but these tribunals hold in effect that even though a party files his application and discloses the subject matter of invention without claiming same, there is a presumption of abandonment and dedication to the public upon issue of the patent where there is no copending application.

It has been the practice of the Patent Office since the decision of the Supreme Court in the Corn-Planters' patent, *Brown* v. *Guild,* 90 U. S. (23 Wall.) 181, 23 L. Ed. 160 (1874), that an abandoned application could not be used as an anticipation or as a completed invention. This Court referred to the doctrine of *Brown* v. *Guild* in the *Milburn* v.

Davis case with apparent approval. The Court of Customs and Patent Appeals has followed this legal rule in its decision in *Euth* v. *Oliver*, 70 F. (2d) 110 (1934), and compares this doctrine with the *Conover* v. *Downs* decision, having in mind in both cases the same point, namely, that there was an abandonment of the invention. The Court of Customs and Patent Appeals in the case of *Writer* v. *Kiwad*, 63 F. (2d) 259 (1933), in referring to *In re Spitteler*, 31 App. D. C. 271 (1908), and *Conover* v. *Downs, supra*, stated that where the original application matured into a patent prior to the filing of an alleged divisional application the latter **was not a continuance** of the first.

It is thus apparent that there is no real conflict between the decision of the Court of Customs and Patent Appeals in this Interference proceeding and the decision of this Court in *Milburn* v. *Davis, supra*, but on the contrary there is full agreement.

The petitioner has not pointed out wherein any conflict exists between the case of *Harper* v. *Zimmermann*, 41 F. (2d) 261 (D. C. D. Dela., 1930), referred to on page 4 of his petition, and the decision of the Court of Customs and Patent Appeals in this Interference. *Harper* v. *Zimmermann* was an interference suit in equity under R. S. 4915, as amended (35 U. S. C. A. § 63) to obtain letters patent and no conflict is apparent with the decision in the case at bar. The case of *Cleveland Trust Co.* v. *Thomas*, 1 F. Supp. 917 (D. C. D. Mass., 1932), referred to by petitioner on page 4 of his petition, was an interference proceeding in equity under R. S. 4915 (35 U. S. C. A. § 63) to obtain letters patent. A reissue patent was involved in that case and the court held that the reissue patent was entitled to the filing date of the original application. This difference in the factual situation shows there is no conflict between the *Cleveland Trust* case and the decision in the present case.

CONCLUSION.

It is urged that for the various reasons stated above the petition for writ of certiorari should be denied.

Respectfully submitted,

FREDERICK SCHAFER,
CHESTER H. BIESTERFELD,
Counsel for Respondent.

June 11, 1940.